In the Supreme Court of the United States

OCTOBER TERM, 1973

JACK R. COBBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Robert H. Bork
Solicitor General
Department of Justice
Washington, D.C. 20530

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No. 75-477

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Petitioner contends that he was denied due process of law by the passage of approximately four years between his commission of the offense and his indictment; that there was insufficient evidence to show that he had a criminal intent in filing a false statement for the purpose of obtaining a Federal Housing Administration (FHA) insured loan; that the sentencing procedure employed by the district court denied him due process of law; and that his counsel at the sentencing procedure was incompetent.

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of falsifying an application for an FHA guaranteed loan in violation of 18 U.S.C. 1010. He was sentenced to imprisonment for one year and one day and was fined $2,000. The court of appeals affirmed (Pet. App. 16-18).

The evidence showed that on the basis of a credit application prepared by petitioner (Tr. 158, 217-219, 581),[1] the First Security National Bank and Trust Company (First Security Bank) loaned him $2,500 (Tr. 235-236). The credit application, which indicated on its face that its purpose was "to obtain credit under the provisions of Title I of the National Housing Act" (Exhs. 1 and FHA 1),[2] contained numerous false statements:[3] that petitioner had no past due obligations owed to or insured by any agency of the federal government (Tr. 193); that he had no existing obligations to other banks (Tr. 316-319, Exh. 3; Tr. 322-326, Exh. 4; Tr. 330-331); that First Security Bank held a lien on his 1967 Cadillac automobile (Tr. 157); and that the loan would be used to improve petitioner's home by adding a family room to the basement and fixing a leak in a retaining wall (Tr. 225, 360-363, 371-372, 381). On the basis of this credit application, First Security Bank submitted the loan to the FHA to be insured (Tr. 149).

1. Petitioner contends (Pet. 9-11) that he was denied due process of law by the passage of four years between the commission of the crime and the return of the indictment. Petitioner does not contend that the delay was caused by any attempt by the government to obtain

[1]"Tr." refers to the transcript of the trial.

[2]"Exh." refers to exhibits forming part of the record below.

[3]The transcript references are to testimony establishing the falsity of the statements.

an advantage.[4] Rather, he claims only that he was prejudiced since "he had no opportunity to prepare or present any defense and he was denied his right to effective cross-examination of government witnesses" because none of the witnesses could recall the events surrounding the execution of the document (Pet. 11).

This claim was insufficient to establish prejudice. Here, the trial court after a pre-trial hearing correctly found that the evidence at trial would be based primarily on documents and that petitioner had ample opportunity to refresh his memory from these documents (H. 99-100). The court of appeals, in affirming, noted that petitioner "completely failed to demonstrate that any important witnesses or documents were not available at the time of trial" (Pet. App. 17). The courts below thus properly declined to dismiss the indictment. See *United States* v. *Marion*, 404 U.S. 307, 325-326.

2. Petitioner contends (Pet. 11-12) that there was insufficient evidence to establish the requisite intent. He does not deny that the application contained false statements. The evidence at trial showed that the statement that petitioner had no past due obligations owed to or

[4]Evidence at the pre-trial hearing established that the credit application was filed with the First Security Bank on or about February 13, 1969 (H. 70). On January 15, 1970, the original credit application was forwarded to the FHA with a claim for the insurance because of default on the loan (H. 73-74). The matters involved in this case were brought to the attention of the FBI by the Fayette County Sheriff's Office on May 15, 1972 (H. 86, 90). On September 11, 1972, agents conducting the investigation obtained a statement from petitioner about the facts surrounding the subject loan (H. 17, 21-22). On or about December 5, 1972, the FBI agent in charge of the investigation brought the matter to the attention of the United States Attorney's Office (H. 87). Petitioner was arrested on December 12, 1972 (H. 88). The indictment was returned by the next regularly sitting grand jury for the Eastern District of Kentucky at Lexington on March 27, 1973 (H. 88).

insured by any agency of the federal government was false (Tr. 193, Exhs. 1 and FHA 1), and the application form itself made clear that in order to be eligible for any further FHA Title I loans any defaults in existing debts must be eliminated. Petitioner's statement was thus designed to establish eligibility for the loan he was seeking. Petitioner also did not list on the application other outstanding loans (Exh. 3, Tr. 316-319; Exh. 4, 322-326, Tr. 330-331).

Viewed most favorably to the government, *Glasser* v. *United States*, 315 U.S. 60, 80, the evidence was sufficient, as the court of appeals found, to show that petitioner knowingly made false statements with the intent to obtain a loan and influence the FHA (Pet. App. 17). See *United States* v. *Barbato*, 471 F.2d 918, 922 (C.A. 1); *United States* v. *Leach*, 427 F.2d 1107, 1112 (C.A. 1), certiorari denied, 400 U.S. 829; *Steingold* v. *United States*, 262 F.2d 1, 2 (C.A. 6).

3. Petitioner argues (Pet. 12-15) that the court's sentencing procedure denied him due process of law because he did not receive adequate assistance of counsel in regard to sentencing, as a result of which there was no pre-sentence report; petitioner also claims that the judge was biased against him.

a. The Probation Department informed the court at sentencing that it could not submit a pre-sentence report because petitioner's counsel had advised it that for strategic reasons, petitioner would not fill out the probation forms (S.S. 3-4).[5] The court indicated its willingness to delay sentencing to obtain a report (S.S. 6), but petitioner's counsel requested that the court proceed directly to sentencing, indicating that petitioner and two of his co-counsel

[5]"S.S." refers to the transcript of the sentencing session on May 14, 1973.

would respond to any inquiries the court might make (S.S. 7).

Rule 32(c)(1), Fed. R. Crim. P., provides that a defendant, with the court's permission, may waive a pre-sentence investigation and report. The court rigorously questioned the U.S. Attorney, petitioner and petitioner's counsel about information relevant to sentencing, gave petitioner an opportunity to rebut and explain the information presented and to describe the circumstances surrounding the criminal offense (S.S. 15-31). In light of petitioner's express waiver and in the absence of any showing of prejudice to petitioner from being sentenced without a pre-sentence report,[6] the court did not abuse its discretion. *United States* v. *Sanders*, 466 F.2d 673, 674 (C.A. 9); *United States* v. *Teague*, 445 F.2d 114, 122 (C.A. 7). See also *United States* v. *Frazier*, 479 F.2d 983, 987 (C.A. 2).

Petitioner contends that his lawyers were ineffective at sentencing because they lacked knowledge of the sentencing procedure and because they told him to proceed to sentencing so that counsel could meet a scheduled flight to California that day (Pet. 13-14). Petitioner presents no evidence to support these allegations and the record of the sentencing session shows none. Moreover the record of the sentencing session shows that petitioner's counsel made a reasonable tactical decision in trying to avoid an investigation into petitioner's past.

b. Petitioner alleges that the court's remarks at the pre-sentencing hearing concerning his "sexual behavior were so fraught with personal bias as to constitute a denial of due process" (Pet. 14). At a recess during the trial, in the presence of a witness and at least two jurors, petitioner had displayed photographs of women naked

[6]Indeed, the information developed at the pre-sentence hearing showed that petitioner had good reason to void an extensive investigation into his past activities. See, *e.g.*, S.S. 15.

from the waist up (Tr. 478-516). The interrogation at the sentencing hearing was related to this incident (S.S. 24-30)[7] and was appropriate in a sentencing proceeding. See *Williams* v. *New York*, 337 U.S. 241, 246. This inquiry did not indicate prejudice against petitioner.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[7] The Assistant U.S.Attorney stated that some of the photographs were of a prosecution witness, and that he was advised that petitioner had sent copies of them to the witness' baby sitter with a letter indicating that he would get the witness by use of the pictures if she testified (S.S. 22). Petitioner denied this but admitted that one of the women in the pictures was a married woman with whom petitioner had had sexual relations. After she was divorced and her ex-husband wrote a threatening letter to petitioner blaming him, petitioner sent the man a photograph of his wife showing her nude from the waist up and writing that he should forget it because his wife "is not the most innocent person in the world" (S.S. 29).